No. 02-1609

In The Supreme Court Of The United States

CITY OF LITTLETON,

Petitioner,

v.

Z. J. GIFTS D-4, L.L.C., a Colorado Limited Liability Company d/b/a Christal's,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF OHIO AND 14 OTHER STATES AS *AMICI CURIAE* SUPPORTING PETITIONER

JIM PETRO
Attorney General of Ohio
DOUGLAS R. COLE*
State Solicitor
**Counsel of Record*
REBECCA L. THOMAS
Assistant Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
Counsel for *Amici* States

Of Counsel:

DAN SCHWEITZER
National Association of Attorneys General
750 First St., N.E.
Suite 1100
Washington, DC 20002
202-326-6010

WILLIAM H. PRYOR, JR.
Attorney General
State of Alabama

KEN SALAZAR
Attorney General
State of Colorado

M. JANE BRADY
Attorney General
State of Delaware

MARK J. BENNETT
Attorney General
State of Hawaii

STEVE CARTER
Attorney General
State of Indiana

THOMAS J. MILLER
Attorney General
State of Iowa

THOMAS F. REILLY
Attorney General
Commonwealth of
Massachusetts

JEREMIAH W. (JAY) NIXON
Attorney General
State of Missouri

W.A. DREW EDMONDSON
Attorney General
State of Oklahoma

HARDY MYERS
Attorney General
State of Oregon

PAUL G. SUMMERS
Attorney General
State of Tennessee

GREG ABBOTT
Attorney General
State of Texas

MARK L. SHURTLEFF
Attorney General
State of Utah

WILLIAM H. SORRELL
Attorney General
State of Vermont

QUESTION PRESENTED

Whether the requirement of prompt judicial review imposed by *FW/PBS, Inc. v. Dallas*, 493 U.S. 215 (1990), entails a prompt judicial determination or a prompt commencement of judicial proceedings.

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INTEREST OF THE *AMICI* STATES

State and local governments work together to regulate businesses operating within their borders, including adult businesses. A State may enact adult-business regulations itself, or it may authorize local governments to do so.[1] At the same time, it is state statutes or rules of court that govern the process of providing for state court review of adverse licensing decisions made by local governments.

Through whatever means are chosen, States are, to varying degrees, involved in regulating businesses at the local level, and have a strong interest in ensuring the success of that regulation. This is especially true in the area of adult-business regulation aimed at ameliorating the local secondary effects known to result from such businesses, such as crime and urban blight. These problems directly affect the quality of residents' lives, and therefore are the proper concerns of both state and local governments. Further, States have a strong interest in protecting their courts from undue interference with docket management, not to mention an interest in avoiding the separation-of-power problems that mandated judicial-decision deadlines present. Consequently, the *amici* States are concerned about the imposition of unwarranted court-decision deadlines that could strain scarce judicial resources and threaten the integrity of the judicial deliberation process.

The *amici* States therefore wish to add our voices to this discussion of whether an adult-business licensing scheme that is otherwise constitutional must provide for a speedy judicial determination with respect to adverse administrative

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[1] *See, e.g.*, Ohio Revised Code §§ 503.51, *et seq.* (enabling legislation allowing townships to regulate "adult cabarets"); Tennessee Code §§ 7-51-1121, *et seq.* (enabling legislation for counties to regulate "adult-oriented establishments"); 24 Delaware Code §§ 1601, *et seq.* (statewide regulation of "adult entertainment establishments").

licensing decisions. We ask this Court to reverse the court of appeals and hold that the First Amendment is satisfied by prompt access to court to review such decisions.

SUMMARY OF ARGUMENT

State and local governments have substantial interests in combating the harmful secondary effects, such as crime and urban blight, that adult businesses are known to cause. The Court has upheld certain adult-business regulations, distinguishing them from censorship schemes and subjecting them only to intermediate scrutiny under the First Amendment, as long as they were aimed at the secondary effects of those businesses. Adult-business licensing schemes like Littleton's—likewise aimed only at secondary effects—should be accorded the same treatment.

The Court has applied different standards to prior-restraint censorship schemes than to regulations, such as those here, geared toward eradicating secondary effects of adult businesses. Thus, when faced with content-based censorship schemes, the Court has declared them presumptively unconstitutional because of the grave danger that constitutionally-protected speech will be wrongfully suppressed, and applied strict standards to ensure the protection of free speech rights. For example, this Court, in *Freedman v. Maryland*, 380 U.S. 51 (1965), held that certain safeguards must accompany a content-based film censorship scheme to satisfy the First Amendment, and placed on the government the entire burden of proving the validity of an adverse decision.

But in *FW/PBS, Inc. v. Dallas*, 493 U.S. 215 (1990), Justice O'Connor's opinion concluded that an adult-business licensing scheme—involving nondiscretionary decision-making based on objective criteria developed to ameliorate negative secondary effects of adult businesses—merited

lesser scrutiny, as it did not present a serious danger of censorship and thus was not presumptively unconstitutional. *See id.* at 223-230 (principal opinion of O'Connor, J.). The opinion determined that such a scheme must merely assure a timely administrative decision and provide for "the possibility of prompt judicial review." *See id.* at 228.

The *amici* States submit that prompt *access* to court satisfies the "prompt judicial review" requirement in this context. Littleton's licensing scheme, like the Dallas scheme at issue in *FW/PBS*, is more like a zoning ordinance than a censorship scheme. Because this type of licensing scheme is not content-based, the danger of unconstitutional suppression of speech is slight, and the businesses do not need the type of protection mandated by *Freedman*. Instead, businesses receive all of the safeguards they need when the scheme imposes reasonable time limits on administrative decisions and provides for prompt access to court review. Indeed, since the criteria in the schemes are objective and ministerially applied, even to the extent that erroneous licensing decisions might cause constitutional harm, the applicant could readily demonstrate that error to a court and obtain an injunction or other temporary relief pending review if necessary.

Conversely, imposing a requirement of a speedy judicial *decision* would significantly impede governments' ability to address the secondary effects of adult businesses. Imposing court deadlines raises serious separation-of-powers problems, and the only alternative is to suffer the secondary effects these businesses cause, either temporarily or permanently. Because the licensing criteria will render content-based decisions highly unlikely, however, these costs are imposed for no reason—the businesses' First Amendment rights are already sufficiently protected. Accordingly, there is simply no basis for imposing a speedy-judicial-decision requirement on these licensing schemes.

The *amici* States, then, argue first and foremost that there should be no speedy-judicial-decision requirement imposed at all. If, however, this Court decides otherwise, then the *amici* States urge the Court not to foreclose the possibility that provisional licenses or the equivalent while review is pending are a constitutionally-adequate substitute for speedy judicial determination. These temporary licenses fully safeguard First Amendment rights because, if no speech is suppressed pending review, no unconstitutional censorship can possibly occur.

ARGUMENT

I. The First Amendment Does Not Require That An Otherwise Constitutional Content-Neutral Licensing Scheme For Adult Businesses Guarantee A Speedy Judicial Decision.

A. The Court has recognized that governments may regulate adult businesses in order to ameliorate the secondary effects of those businesses.

It is common knowledge that certain undesirable secondary effects, such as increased crime and decreased property values in surrounding areas, tend to accompany adult businesses. *See Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986) (citing the "admittedly serious problems" that arise in conjunction with adult businesses) (quoting *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50, 71 (1976) (plurality opinion)); *Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 444 (2002) (Kennedy, J., concurring) ("Municipal governments know that high concentrations of adult businesses can damage the value and the integrity of a neighborhood"); *Erie v. Pap's A.M.*, 529 U.S. 277, 297 (2000) (plurality opinion) (holding it reasonable for a city to

rely on the evidence in *Young* and *Renton* "to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood").

It is likewise well-established that there is a substantial governmental interest in regulating adult businesses in an effort to ameliorate those secondary effects. *See Renton*, 475 U.S. at 50 (interests in combating negative secondary effects of adult businesses to preserve urban quality of life are "vital governmental interests" that deserve "high respect") (quoting *Young*, 427 U.S. at 71 (plurality opinion)); *Erie*, 529 U.S. at 296-97 (plurality opinion) (government interests in combating the "harmful secondary effects" associated with adult entertainment establishments is "undeniably important); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 244 (1990) (White, J., and Rehnquist, C.J., concurring in part and dissenting in part) ("[T]here is a substantial governmental interest in regulating sexually oriented businesses because of their likely deleterious effect on the areas surrounding them") (citing *Renton* and *Young*); *Alameda Books*, 535 U.S. at 435-36 (plurality opinion) (substantial government interest in reducing crime permits a city to regulate adult businesses in ways that evidence reasonably indicates will reduce crime).

Although regulations directed at the *content* of speech are subject to strict scrutiny under the First Amendment, this Court has held that regulations aimed at the *secondary effects* of adult businesses are subject only to intermediate scrutiny. For example, this Court has applied intermediate scrutiny to zoning regulations and regulations prohibiting certain conduct, and upheld them. *See, e.g., Alameda Books*, 535 U.S. at 433-443 (plurality opinion); *id.* at 445 (Kennedy, J., concurring); *Renton*, 475 U.S. at 46-50, 54; *Erie*, 529 U.S. at 289-302 (plurality opinion). As shown below, (1) the secondary-effects framework—rather than a prior restraint

analysis—applies to licensing schemes like Littleton's, and (2) accordingly, the *Freedman* requirement of a speedy judicial decision does not properly apply to them.

B. An adult-business licensing scheme aimed at secondary effects is not a content-based censorship scheme; thus, it need not meet the same standards as a censorship scheme.

Content-based censorship schemes, which are prior restraints aimed at suppressing classes of unprotected speech (such as obscenity), are presumed unconstitutional because of the grave danger that governmental actors will use the schemes to wrongfully suppress constitutionally-protected speech that they deem undesirable. *See generally FW/PBS*, 493 U.S. at 225-26, 229 (principal opinion of O'Connor, J.); *Thomas v. Chicago Park District*, 534 U.S. 316, 321 (2002). *See also Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-59 (1975) (presumption against prior restraints exists because "the risks of freewheeling censorship are formidable"). For that reason, in *Freedman v. Maryland*, 380 U.S. 51 (1965), this Court held that certain procedural safeguards must accompany a content-based film censorship scheme, including the guarantee of a speedy judicial determination following an adverse administrative decision. *See id.* at 59; *City News and Novelty, Inc. v. Waukesha*, 531 U.S. 278, 280-81 (2001).

In fact, *Freedman* placed the entire burden on the government to demonstrate the propriety of its censorship. Of course, this approach makes sense in the context of an administrative decision that is *presumptively unconstitutional*. *See FW/PBS*, 493 U.S. at 225, 229 (opinion of O'Connor, J.). According to *Freedman*, a government is required to make a quick (presumptively-invalid) administrative decision itself, then institute court proceedings and there prove the validity of its

(presumptively-invalid) decision, and then make sure that the judicial determination is issued promptly. *See id.* at 58-60. The *Freedman* requirements work together to make sure that, when a government enacts laws designed to allow suppression of speech based on content, it bears the entire burden of justifying that suppression.

But adult-business licensing schemes like Littleton's do not present a similar danger of censorship, because they involve nondiscretionary decisionmaking based on objectively-determinable criteria developed for the purpose of ameliorating the negative secondary effects of adult businesses. *See FW/PBS*, 493 U.S. at 228-29 (opinion of O'Connor, J.).[2] Nondiscretionary regulatory schemes aimed at the secondary effects of adult businesses—even though they apply to only one particular class of businesses—provide "less reason to be concerned that [governments] will use these [regulations] to discriminate against unpopular speech." *See Alameda Books*, 535 U.S. at 440 (plurality opinion).

The Littleton licensing scheme applies only routine, objective criteria to applicants, leaving no room for discretion on the part of agency officials. For example, under the Littleton scheme, a license application may be denied only if the applicant is under age 18; has provided false information in connection with the application; owns, operates, or is an adult business that has lost its adult-

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[2] Justices Stevens and Kennedy joined Justice O'Connor's opinion on the question of *Freedman's* application. Justices Brennan, Marshall, and Blackmun concurred in the judgment but would have applied all of the *Freedman* safeguards (*see FW/PBS*, 493 U.S. at 238-39 (Brennan, J., concurring in the judgment)), whereas Justices White and Rehnquist (*see id.* at 244 (opinion of White, J.)) and Scalia (*see id.* at 250-264 (opinion of Scalia, J.)) would not have applied any of the *Freedman* safeguards.

business license in the state within the past year; has operated an adult business found to be a public nuisance in the state within the past year; is a corporation not in good standing or authorized to do business in the state; owes taxes, fees, fines, or penalties assessed in relation to an adult business; does not have a required sales tax license; or has been convicted of specified sex crimes or crimes connected with another adult business within the past five years. *See* Littleton City Code (hereinafter "LCC") Sections 3-14-8 and 3-14-2, reprinted in Petitioner's Brief at Br. App. 28a-30a and 12a-20a, respectively. For another example of an adult-business licensing scheme that properly curtails the discretion of local officials, *see* Union Township, Ohio, Resolution 00-22(F)(2), reprinted at http://www.union-township.oh.us/Resources /Resolution%2000-22.pdf.[3]

Criteria such as these have nothing to do with the content of any speech, and whether an applicant meets them is objectively determinable. This contrasts sharply with schemes that do allow for discretion, such as the ordinance struck down in *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), which gave the mayor "unfettered discretion" to deny newsrack-placement permits and "unbounded authority" to place additional conditions on granted permits, *see id.* at 772. It is hard to imagine how, under the Littleton ordinance, an agency official would manufacture an applicant's underage status or a tax debt or a sex-crime conviction in order to deny a license application.

The lack of a true nexus between these adult-business licensing schemes and speech content is further evidenced by the fact that the schemes do not target only "adult speech"

[3] Resolution 00-22 is currently at issue in *Deja Vu of Cincinnati, L.L.C. v. Union Township Board of Trustees*, 326 F.3d 791, 800 (6th Cir. 2003), *rehearing granted and opinion vacated* (Aug. 1, 2003).

businesses, but also adult businesses that do not engage in expressive activity. For example, Littleton's licensing requirements apply to adult motels and "sexual encounter establishments."[4] *See* LCC Sections 3-14-2 and 3-14-4, reprinted in Petitioner's Brief at Br. App. 12a-20a and 23a. Similar ordinances across the country likewise apply (or have applied) to non-expressive adult businesses. *See, e.g., FW/PBS*, 493 U.S. at 220 (applied to adult motels, sexual encounter centers, and escort agencies); *Essence, Inc. v. City of Federal Heights*, 285 F.3d 1272, 1277 n.1 (10th Cir. 2002) (applied to adult motels and sexual encounter establishments); *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251, 1257-59 (11th Cir. 1999) (applied to adult motels); *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1368 (11th Cir. 1999) (applied to escort agencies); *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 222 n.2 (6th Cir. 1995) (applied to adult motels, escort agencies, and sexual encounter centers). Any suppression of speech is incidental to the permissible fulfillment of a government objective that is wholly content-neutral: ameliorating the secondary effects known to be caused by a class of businesses, regardless of whether those businesses are expressive.

[4] "Sexual encounter establishment" is defined in the Littleton ordinance as a "business or commercial establishment, that as one of its primary business purposes, offers, for any form of consideration, a place where two (2) or more persons may congregate, associate, or consort for the purpose of 'specified sexual activities' or the exposure of 'specified anatomical areas' or activities when one or more of the persons is in a state of nudity or seminude." An adult motel is not included in this definition merely "by virtue of the fact that it offers private rooms for rent." *See* LCC Section 3-14-2, reprinted in Petitioner's Brief at Br. App. 12a-20a.

Such schemes, because they involve virtually no danger of censorship, are properly held to lesser scrutiny than censorship schemes. This is true whether or not these schemes are labeled "content-neutral." *See, e.g., Renton,* 475 U.S. at 47-48 (an adult-business zoning ordinance aimed not at content but at secondary effects is "completely consistent with [this Court's] definition of 'content-neutral' speech regulations"); *Alameda Books*, 535 U.S. at 440-41 (plurality opinion) (distinction between content-neutral and content-based regulation of adult speech rests on whether the regulations are motivated primarily by speech content or by its secondary effects); *id.* at 448-49 (Kennedy, J., concurring) (zoning regulations applicable only to adult businesses are content-based, but should be subject to the same scrutiny as are content-neutral regulations because of their "prima facie legitimate purpose" of decreasing secondary effects and not speech); *Erie*, 529 U.S. at 295-96 (plurality opinion) (scrutinizing ban on nude dancing as content-neutral because it was enacted to combat secondary effects of adult entertainment businesses rather than to suppress a message). However denominated, the lower risk such schemes present justifies reduced judicial oversight.

Nor can respondents raise the specter of "prior restraint" in order to justify heightened review. Because these ministerial licensing schemes are not designed to—and do not—suppress speech on the basis of its content, they are not "prior restraints" as this Court has used that term. Under this Court's jurisprudence, this latter term is limited to those regimes that include content-based decisionmaking by officials using discretionary judgment. *See Southeastern Promotions*, 420 U.S. at 554. And it is these characteristics—content review and broad discretion—that render censorship schemes like the one in *Freedman* subject to stricter scrutiny. Their absence here justifies the application of intermediate scrutiny—a form of oversight that

strikes a reasonable balance between the slight risks of censorship and the substantial governmental interests in combating secondary effects.

C. Prompt access to court, rather than *Freedman*'s speedy-judicial-determination requirement, suffices to protect the First Amendment interests of adult businesses.

Decisions made under non-content-directed licensing schemes are presumptively valid, *see FW/PBS*, 493 U.S. at 229 (opinion of O'Connor, J.), and so it is unnecessary—and, in fact, improper—to place the entire burden of justification on the government. In accordance with this understanding of the differences between the licensing scheme in *FW/PBS* and the censorship scheme in *Freedman*, Justice O'Connor's opinion in *FW/PBS* properly concluded that the licensing scheme at issue merited application of only "some of the *Freedman* standards." *Waukesha*, 531 U.S. at 281. The scheme need not, for example, place on the government the burden of seeking judicial review and the burden of proof in court. *FW/PBS*, 493 U.S. at 230 (opinion of O'Connor, J.). But it must provide that the administrative decisionmaking happens in a reasonably brief period of time. *Id.* at 228. And it must ensure "the possibility of prompt judicial review." *Id.*[5]

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[5] The *amici* States note that Littleton's current licensing scheme satisfies the administrative-delay prong of *Freedman* and *FW/PBS*. *See* LCC Section 3-14-8, reprinted in Petitioner's Brief at Br. App. 28a-30a (final administrative decision guaranteed within 40 days of application date). This brief also assumes that the Littleton ordinance satisfies the test set forth in *Renton* for determining whether a regulation applicable only to adult businesses is a valid time, place and manner restriction designed to reduce the secondary effects arising out of such businesses. *See id.*, 475 U.S. at 47-50. As in *FW/PBS*, 493 U.S. at 223 (opinion of O'Connor, J.), the Court need not reach that issue.

In *FW/PBS*, this Court did not need to decide exactly how "prompt judicial review" would be accomplished in the licensing context. Instead, Justice O'Connor's opinion extensively discussed the failure of the scheme at issue to provide adequate time limits to ensure sufficiently prompt administrative decisions. *See id.* at 226-29. After setting out in general terms the standards to be applied to the licensing scheme, and describing the scheme's failure on the administrative-delay prong of *Freedman*, the opinion added only the bare statement that the scheme also failed to "provide an avenue for prompt judicial review." *See id.* at 229. Given this conclusion, there was no need to elucidate the specific contours of "prompt judicial review" in the context of a non-content-directed licensing scheme. The *amici* States submit that prompt access to court would satisfy the First Amendment.

A licensing scheme such as Littleton's—which targets secondary effects of adult businesses, expressive and non-expressive alike, employs objective criteria that leave no meaningful discretion in the hands of government officials or agencies, provides for timely administrative decisions, and provides for direct and prompt review of those decisions[6]—has much more in common with adult-business zoning ordinances like the one upheld in *Renton* than it does with a *Freedman*-like censorship scheme. It is presumptively valid, and it must not be sacrificed too easily in the name of the free speech rights of businesses known to cause serious harm to the surrounding community.

Instead, the governmental interest in protecting property, reducing crime, and generally maintaining or improving the quality of life of residents must be balanced

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[6] *See* LCC Sections 3-14-8(B)(3), reprinted in Petitioner's Brief at Br. App. 30a.

against the risks to First Amendment rights of the regulated businesses. And, the opportunity for censorship, the only First Amendment harm at issue, is vanishingly slight where, as here, the licensing decisions are based on objective, non-content-based criteria. Consequently, the affected businesses do not need the level of protection offered by *Freedman*, whose standards were developed specifically for content-based censorship schemes. Conversely, the governmental interest in fighting secondary effects of adult businesses is great, and a government must be allowed to implement a licensing scheme aimed at those effects without procedural requirements that will tend to undermine the effectiveness—or threaten the very existence of—the scheme. In the case of the above-described type of licensing scheme, a fair balancing occurs when the scheme provides for reasonable time limits on administrative decisions and a way for businesses to obtain prompt access to court review if they so desire.

The danger that local officials might use a licensing program like Littleton's to interfere with any adult business's expressive rights is no greater than that same danger in relation to any law of general applicability, such as a tax law or a fire code provision. And these latter laws, of course, are not subject to strict judicial scrutiny merely because they are applied to an adult business. *See generally U.S. v. O'Brien*, 391 U.S. 367 (1968) (facially speech-neutral law prohibiting certain conduct only incidentally affected speech and thus was subject only to intermediate scrutiny); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986) (First Amendment not implicated by closure of adult bookstore pursuant to generally-applicable, facially speech-neutral public health regulation). There is no reason to impose such scrutiny on the ministerial licensing decisions here. In fact, the only true potential harm the regulations present—which is not even a First Amendment danger—is the possibility of erroneous licensing decisions. And given that the regulations provide

for ministerial decisions based on content-neutral criteria—at least in the type of licensing schemes that the *amici* States are here discussing—applicants who are wronged should have little difficulty demonstrating that error to a court, and even obtaining interim relief while review is pending.

D. Requiring a guarantee of speedy judicial determination would significantly impede the ability of state and local governments to address the secondary effects of adult businesses.

As noted above, state and local governments have strong—and wholly legitimate—interests in preventing or diminishing the negative secondary effects associated with adult businesses, including crime and neighborhood deterioration. Governments may constitutionally effectuate those interests by enacting laws aimed precisely at those secondary effects. They do so most effectively (and most lawfully) when they single out adult businesses as a class. *See, e.g., Renton*, 475 U.S. at 52 (praising Renton's narrowly-tailored classification to affect only the businesses producing the unwanted secondary effects).

Making a speedy-judicial-determination guarantee a condition of court approval of otherwise constitutional licensing schemes, however, places the governments in a difficult position, and presents substantial separation-of-powers problems. First, States will have to decide whether to attempt to impose expedited-ruling laws on courts deciding adult-business license issues, to the detriment of other cases on the dockets that may be even more pressing but that will not get such special treatment. There will doubtless be other pending cases involving claims of constitutional violations—and some of those will certainly be First Amendment claims, such as time-place-manner disputes. Since censorship is such a remote possibility with respect to nondiscretionary,

non-content-directed licensing schemes, there is no sound basis for giving special, expedited treatment to these adult business licensing decisions by thrusting them to the front of the line when everyone else must wait his or her turn.

Second, as some courts have recognized, state legislatures run afoul of separation-of-powers principles when they attempt to impose court decisionmaking deadlines. *See, e.g., Allen v. Butterworth*, 756 So.2d 52 (Fla. 2000) (rejecting state legislature's imposition of deadlines for postconviction motions as violation of separation of powers under state constitution); *Complaint Against Grady*, 348 N.W.2d 559 (Wisc. 1984) (holding state statute imposing deadlines for judicial decisionmaking to be violation of separation of powers under state constitution); *Coate v. Omholt*, 662 P.2d 591 (Mont. 1983) (same).

If speedy-decision laws are rejected by state courts, or a State decides it cannot in good faith enact such laws, local governments are left with two options: offering provisional licenses or stays, and thus suffering the secondary effects while appeals by non-qualified adult businesses are decided, or abandoning altogether the adult-business licensing scheme and thus forgoing perhaps the best method available for minimizing secondary effects. But there is no sound basis for imposing the speedy-decision requirement in the first place. Given the non-discretionary, non-content-based nature of the criteria these otherwise constitutional licensing schemes employ, the possibility of content-based decisionmaking is virtually non-existent, and an adult business's First Amendment rights are thus already sufficiently protected from the risk of censorship.

II. In The Alternative, If Assurance Of A Speedy Judicial Determination Is Required, The Court Should Recognize That Provisional Licenses (Or The Equivalent) Pending Completion Of The First Level Of Judicial Review Will Alleviate Any First Amendment Concerns.

If this Court nonetheless concludes that the *Freedman* speedy-judicial-determination requirement applies in the adult-business licensing context, the Court should also recognize that allowing a business to operate pending judicial review is an acceptable alternative to a guaranteed speedy judicial determination. As the Court recently noted, the "typical concern" of a business already operating but facing loss of a license is "not the speed of court proceedings, but the availability of a stay of adverse action during the pendency of judicial review, however long that review takes." *Waukesha*, 531 U.S. at 285-86 (also noting that "[s]wift judicial review is the remedy needed by those held back from speaking"). *See also National Socialist Party of America v. Village of Skokie*, 423 U.S. 43, 44 (1977) (holding that, absent "immediate appellate review" under *Freedman*, government "must instead allow a stay"). Allowing the business to continue operating fully addresses this "typical concern."

The only potential constitutional evil lurking in these situations is the wrongful suppression of speech. If no speech is suppressed pending judicial review, however, then a business's First Amendment rights cannot possibly be unconstitutionally burdened. An adult business may proceed with its plans to open (in the case of a license denial) or may continue to operate (if a license has been nonrenewed) until a judicial decision is rendered. No reason will exist to upset a court's normal docket management or force the parties to litigate at an accelerated (and thus perhaps more costly) pace.

The Court should provide guidance on this issue, should the speedy-judicial-decision standard be imposed. At least one circuit court has concluded that the uncertainty during the judicial review process—even with a provisional license—will be "chilling" to the affected business operators. *See Deja Vu of Cincinnati, L.L.C. v. Union Township Board of Trustees*, 326 F.3d 791, 800 (6th Cir. 2003), *rehearing granted and opinion vacated* (Aug. 1, 2003).[7] Temporary permits in lieu of fast judicial decisions, however, are unlikely to deter owners from applying for licenses or license renewals, given their stakes in their businesses. *See FW/PBS*, 493 U.S. 229-30 (opinion of O'Connor, J.). In fact, Respondent itself advocates this result. *See* Brief in Opposition 13-14.

Nor can one buttress the First Amendment claim by asserting that the rights under the license are too uncertain because the license is only temporary and lasts only during the pendency of judicial review. Any such uncertainty is minimal, and largely remediable by business owners themselves. Where a licensing scheme is aimed only at secondary effects of adult businesses, allows for no significant discretion on the part of the decisionmaker, and involves known, objectively-determinable licensing criteria, a business owner should have little difficulty ascertaining the likelihood that his application will be granted. In light of this, the only "uncertainty" that an adult business could claim is economic uncertainty in the face of pending litigation. But business uncertainty is not a First Amendment concern in and of itself. "The inquiry for First Amendment purposes is not

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[7] *But see 4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108, 1115 (9th Cir. 1999) (automatic stay pending appeal would be constitutionally acceptable); *11126 Baltimore Blvd., Inc. v. Prince George's County, Md.*, 58 F.3d 988, 1001 n.18 (4th Cir. 1995) (en banc) (constitutional problem avoided if adult bookstore permitted to operate pending appeal), *cert. denied*, 516 U.S. 1010.

concerned with economic impact." *See Renton*, 475 U.S. at 54 (quoting *Young*, 427 U.S. at 78). The First Amendment is concerned with expressive conduct, not business uncertainty, and those who hold a provisional license are entirely free to engage in their desired form of such conduct.

In sum, if the Court decides that an adult-business licensing scheme must provide for speedy judicial determination of challenges to adverse licensing decisions, it should also make clear that any means whereby the effect of an adverse decision is postponed until judicial review is completed—meaning that an adult business may engage in expressive conduct as if it had received a favorable decision—obviates the need for a court to rush to judgment on a licensing decision.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

JIM PETRO
Attorney General of Ohio
DOUGLAS R. COLE*
State Solicitor
**Counsel of Record*
REBECCA L. THOMAS
Assistant Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
Counsel for *Amici* States

Of Counsel:
DAN SCHWEITZER
National Association of
Attorneys General
750 First St., NE, Suite 1100
Washington, D.C. 20002
202-326-6010

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